Soilchem Sdn Bhd v Standard-Elektrik Lorenz AG

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R8–29 OF 1990
ABU MANSOR J
26 DECEMBER 1992

Arbitration *— Agreement — Jurisdiction of court where agreement provided for dispute to be settled by arbitration — Whether s 34(1) of the Arbitration Act 1952 ousted the court's jurisdiction — Whether arbitrator's awards may be challenged by certiorari — Arbitration Act 1952 s 34(1)*

Civil Procedure *— Arbitration — Effect of arbitration clause on jurisdiction of courts — Whether arbitrator's awards may be challenged by certiorari — Arbitration Act 1952 s 34(1)*

An arbitration agreement in a contract between Soilchem Sdn Bhd ('the applicant') and Standard-Elektrik Lorenz AG ('the respondent') provided for disputes and differences to be settled by arbitration under the Rules of the Regional Centre for Arbitration at Kuala Lumpur. An award was made under the Rules of the Regional Centre on 10 February 1990 and two supplementary awards as to costs were made on 30 March 1990 and 11 January 1991. The applicant then commenced proceedings seeking to challenge the arbitrator's awards by way of certiorari.

On 24 July 1991, the respondent applied for orders that: (i) the proceedings so commenced and the applicant's originating motion be struck out; (ii) in the alternative, the orders of the court made on 21 March 1990 and 16 April 1990 and all proceedings taken out thereunder be set aside; (iii) pending final disposal and determination of the application, the respondent be at liberty to withhold filing an affidavit in reply; (iv) such further or other orders or directions as the court deemed appropriate; and (v) costs.

The respondent's contention was that the court had no jurisdiction since s 34(1) of the Arbitration Act 1952 totally excluded its jurisdiction save as regards enforcement of the award. Section 34(1), it was contended, deprives the court of jurisdiction not only under the Act but under any 'other written law' which included the Rules of the High Court 1980, and further that the court's jurisdiction derived solely from 'written law' and that the court had no inherent jurisdiction. The applicant contended that in order for s 34(1) to oust the court's jurisdiction, very clear words must be used and, in this instance, the section did not oust the jurisdiction of the court.

Held, allowing the respondent's application and ordering that the proceedings commenced by the applicant be struck out:

The policy of s 34(1) of the Act was obviously to exclude cases that are before the Regional Centre for Arbitration from intervention by

A the court. Section 34(1) was meant to and does exclude the jurisdiction of the court, including the jurisdiction to quash by way of certiorari.

[Bahasa Malaysia summary

B Suatu persetujuan timbangtara di antara Soilchem Sdn Bhd ('pemohon') dan Standard-Elektrik Lorenz AG ('responden') membolehkan pertikaian dan perselisihan diselesaikan melalui timbangtara di bawah Kaedah-Kaedah Pusat Serantau bagi Timbangtara di Kuala Lumpur. Suatu award telah dibuat di bawah Kaedah-Kaedah Pusat Serantau itu pada 10 Februari 1990 dan dua C award tambahan mengenai kos telah dibuat pada 30 Mac 1990 dan 11 Januari 1991. Pemohon kemudiannya telah memulakan prosiding melalui certiorari untuk mencabar award penimbangtara.

Pada 24 Julai 1991, responden telah memohon perintah untuk: (i) prosiding tersebut dan usul pemula pemohon dibatalkan; (ii) secara alternatif, perintah mahkamah bertarikh 21 Mac 1990 dan 16 April D 1990 dan semua prosiding berkenaan diketepikan; (iii) sementara menunggu penyelesaian dan pemutusan muktamad permohonan ini, responden mempunyai kebebasan supaya tidak memfailkan afidavit jawapan; (iv) lain-lain perintah atau arahan selanjutnya sebagaimana yang difikirkan sesuai oleh mahkamah; dan (v) kos.

E Responden menghujahkan bahawa mahkamah tidak mempunyai bidangkuasa kerana s 34(1) Akta Timbangtara 1952 ('Akta itu') menyingkir sepenuhnya bidangkuasa mahkamah kecuali terhadap perlaksanaan award. Responden berhujah bahawa s 34(1) menyingkirkan bidangkuasa mahkamah bukan sahaja di bawah Akta itu tetapi juga di bawah 'other written law' yang termasuk Kaedah- F Kaedah Mahkamah Tinggi 1980, dan juga bahawa bidangkuasa mahkamah diperolehi hanya daripada 'written law' dan mahkamah tidak mempunyai bidangkuasa sedia ada. Pemohon berhujah bahawa sebelum s 34(1) boleh bertindak untuk menyingkir bidangkuasa mahkamah, perkataan-perkataan yang sangat jelas mesti digunakan G dan di dalam kes ini, seksyen tersebut tidak menyingkirkan bidangkuasa mahkamah.

Diputuskan, membenarkan permohonan responden dan memerintahkan supaya prosiding yang dimulakan oleh pemohon H dibatalkan:

Adalah jelas bahawa polisi s 34(1) Akta itu ialah untuk mengecualikan kes-kes yang berada di hadapan Pusat Serantau bagi Timbangtara daripada campur tangan mahkamah. Seksyen 34(1) bertujuan dan bertindak untuk menyingkir bidangkuasa mahkamah, termasuk bidangkuasa untuk membatalkan award melalui certiorari.

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[*Editorial Note*: The applicant has appealed to the Supreme Court vide Civil Appeal No 02–133 of 1992.]

Notes

For a case on the effect of an arbitration clause on the jurisdiction of the courts, see 2 *Mallal's Digest* (4th Ed) para 496.

Cases referred to

1 *Klockner Industries-Anlagen GmbH v Kien Tat Sdn Bhd & Another* [1990] 3 MLJ 183 (folld)
2 *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturers Employees Union & Ors* [1980] 2 MLJ 165 (refd)
3 *Mak Sik Kwong v Minister of Home Affairs, Malaysia* [1975] 2 MLJ 168 (refd)

Legislation referred to

Arbitration Act 1952 s 34(1)

M Pathmanathan (instructed by Yusuf Lee Pathma & Marbeck) for the applicants.

Vinayak Pradham (Logan Sabapathy with him) for the respondents.

Abu Mansor J: In this notice of motion dated 24 July 1991, the respondent applied for orders that :

(1) the proceedings herein commenced by Soilchem Sdn Bhd, the above-named applicant, be struck out and the originating motion herein filed by the applicant do stand dismissed;
(2) in the alternative, the orders of the court made on 21 March 1990 and 16 April 1990 and all proceedings taken out thereunder including and not limited to the notice of motion dated 20 December 1990 be set aside.
(3) pending final disposal and determination of this application, the respondent be at liberty to withhold filing an affidavit in reply to that filed by the applicant;
(4) such further or other orders or directions be made or given as this honourable court deems appropriate in the circumstances;
(5) costs of and occasioned by this application.

I granted the respondent's application in terms of their prayer.

Counsel for the respondent, Mr Vinayak Pradhan, submitted that the grounds of the application are in the affidavit of Wilhelm Mallin filed herein. For prayer 1, in para 9 of his affidavit, the deponent said that the arbitrator had made an award on 10 February 1990 and he had also made two supplementary awards for costs on 30 March 1990 and 11 January 1991. The awards were made pursuant to the Rules of the Regional Centre for Arbitration at Kuala Lumpur and the respondent says, therefore, that s 34(1) of the Arbitration Act 1952 (Rev 1972) applies.

Section 34(1) reads:

> Notwithstanding anything to the contrary in this Act or in any other written law but subject to subsection (2) in so far as it relates to the enforcement of an award, the provisions of this Act or other written law shall not apply to any arbitration

held under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965 or under the United Nations Commission on International Trade Law Arbitration Rules 1976 and the Rules of the Regional Centre for Arbitration at Kuala Lumpur.

Counsel for the respondent submitted further that except for the enforcement of the award, the court has no jurisdiction to deal with matters of this sort. He submitted further that it is not only that the Arbitration Act 1952 does not apply, it also spells out anything contrary, in any 'other written law'.

The respondent's counsel cited *Klockner Industries-Anlagen GmbH* v *Kien Tat Sdn Bhd & Anor*,[1] where the matter for arbitration was before the Regional Centre for Arbitration at Kuala Lumpur, arbitrators had been duly appointed and the parties had filed their pleadings. During an adjournment in those proceedings, the applicant therein applied for an order of the court, inter alia, that the applicant be at liberty to continue the counterclaim against the first respondent pending in the Regional Centre in which proceedings were commenced by the second respondent, notwithstanding the order to wind up the first respondent.

Zakaria Yatim J dismissed the application and held [at p 185]:

> It is clear that under ...[s 34(1)] the court cannot exercise its supervisory function as provided in the Arbitration Act 1952, in respect of such arbitration. Neither can the court exercise its supervisory function over such arbitration under any written law. The words 'written law' ... include the Companies Act 1965.

The respondent's counsel submitted that the Rules of the High Court 1980 also come under the term 'written law'.

He says that the parties before the court are German and the respondent is the subsidiary of an Australian company. Counsel says that their understanding is that the award is already at an end and prays that this court follow the decision of Zakaria Yatim J just cited.

In anticipation of the applicant's counsel raising the argument that the court has inherent jurisdiction to entertain the matter, the respondent's counsel submitted that the court's jurisdiction can only be under 'written law' and that, as has been submitted, is prohibited by the Arbitration Act 1952.

At the outset of his submission, Mr Pathmanathan, counsel for the applicant, submitted that in this matter, an application for extension of time to file in six weeks was made and obtained. This court is satisfied that the extension of time to apply was proper and was duly granted.

Mr Pathmanathan in reply to counsel for the respondent's submission in prayer 1 referred to the respondent's contention that s 34(1) of the Arbitration Act 1952 ousts the jurisdiction of the court to supervise. He further submitted that *Klockner Industries-Anlagen GmbH* v *Kien Tat Sdn Bhd & Anor*[1] has been wrongly decided because that decision went on appeal — Civil Appeal No 02–196–90. The appeal was never prosecuted; it was finally withdrawn. Moreover, he says that the judgment of Zakaria Yatim J contained personal opinion and that he had prejudged the issues.

The issue before me, Mr Pathmanathan submitted, is really s 34(1) of the Arbitration Act 1952. Did that subsection oust the court's jurisdiction?

If it is meant to so oust, then the clearest language must be used. In cases of ouster clauses, the words 'shall be final' may be found on the facts not on the law. He submitted further that the jurisdiction of the High Court is not to be taken away except by express words. The statute must say that the remedy of certiorari is not to be used or does not apply. Counsel cited the cases of *South East Asia Fire Bricks Sdn Bhd* v *Non-Metallic Mineral Products Manufacturers Employees Union & Ors*[2] and *Mak Sik Kwong* v *Minister of Home Affairs, Malaysia*[3] as examples where ouster clauses applied.

In substance, Mr Pathmanathan submitted that s 34(1) of the Arbitration Act 1952 does not oust the jurisdiction of the court to quash the decision of the arbitrator.

After considering the submissions of both counsel, I am clear that the policy of the Arbitration Act 1952 was obviously to exclude cases that are before the Regional Centre for Arbitration at Kuala Lumpur. I have no doubt as to the purport and meaning of s 34(1) of the Act. It was meant to exclude the jurisdiction of this court in such cases. I am clear on this and I apply the decision of Zakaria Yatim J in *Klockner Industries*[1] and I made the order in terms of prayer 1 with costs as prayed.

The applicant sought leave to appeal and I granted leave.

Order accordingly.

Reported by Prof Vincent Powell-Smith